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No. 94-1760

JUN 26 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

60 KEY CENTRE, INC., PETITIONER

v.

ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, AND ACQUEST HOLDINGS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to an injunction against performance of a lease for government office space and to award of the lease because the winning bidder for the lease submitted its first bid after the date set by the General Services Administration for submitting initial bids but prior to the date later set for making best and final offers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 47 F.3d 55. The opinion of the district court (Pet. App. 18a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on February 1, 1995. The petition for a writ of certiorari was filed on April 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal respondent, the General Services Administration (GSA), issued a solicitation for offers, seeking bids from the owners of office buildings in downtown Buffalo, New York, to lease new office space for the office of the United States Attorney for the Western District of New York. Pet. App. 3a-4a.[1] The solicitation specified that initial bids were due by February 26, 1992. Pet. App. 4a. The solicitation also included a provision specifically stating that "[a]ny offer or modification of an offer which is received after the exact time specified for receipt of *'best and final' offers* will not be considered," unless certain conditions not pertinent here were satisfied. C.A. App. 125 (emphasis added). GSA regulations governing federal acquisition of leasehold interests require that such a provision be included in GSA solicitations of this sort. 48 C.F.R. 552.270-3(a), 570.701-3.[2]

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[1] The United States Attorney required new office space because the district court for the Western District of New York was preparing an extensive renovation and expansion project for the federal courthouse, where the U.S. Attorney's office was then located, and the project required the U.S. Attorney to vacate its offices in the courthouse. Pet. App. 3a-4a. Because this case thus indirectly affected the judges of the Western District, the case was heard by a district judge for the Southern District of New York, sitting by designation. Pet. App. 3a n.1.

[2] The solicitation uses wording for the late offers clause drawn from the June, 1985, version of Section 552.270-3(a). C.A. App. 125. That regulation was amended on June 2, 1992, effective June 10, 1992. See 57 Fed. Reg. 23,163. The amended regulation differs slightly from the 1985 version, see Pet. 3; Pet. App. 10a, but the differences are not material here.

On February 25, 1992, one day before the date specified in the solicitation for initial bids, petitioner submitted a proposal to lease space in its building. Pet. App. 4a. GSA did not accept any bid at that time. Instead, following routine GSA procedures, it negotiated with the bidders over possible changes in their proposals. Pet. App. 4a, 20a.

During the negotiation process, respondent Acquest Holdings, Inc. (Acquest), submitted its own initial bid on August 10, 1992, a date several months after the date specified in the solicitation for initial bids. Pet. App. 4a. GSA then established a deadline of November 18, 1992, for submission of a new round of "best and final" offers. Both petitioner and Acquest submitted best and final offers by that deadline. *Ibid.* GSA considered Acquest's offer to be timely because it interpreted the regulation, Section 552.270-3(a), as incorporated in the solicitation provision regarding offers received after the time set for best and final offers, to mean that offers are timely if received before the date for best and final offers, even if the offeror did not meet the deadline for initial offers as set forth in the solicitation. Pet. App. 4a.

GSA then evaluated the best and final offers. Acquest scored 17 points higher (out of 100) than petitioner on the five "Award Factor Criteria" (security, quality, location, space layout, and delivery), and its offer had a lower overall price. Pet. App. 4a-5a. As a result, GSA awarded the lease to Acquest on January 22, 1993. Pet. App. 5a.

2. Petitioner immediately filed a bid protest with the General Accounting Office, but the GSA determined, under 31 U.S.C. 3553(d)(2), that Acquest should be permitted to continue performance of the contract, pending resolution of the protest. Pet. App.

5a.[3] On February 23, 1993, petitioner filed a complaint in district court. The complaint sought an injunction prohibiting GSA and Acquest from proceeding with the award of the lease, and a declaratory judgment directing GSA to award the lease to petitioner. Pet. App. 5a-6a. Petitioner did not move for a preliminary injunction until June 3, 1993, and it did not submit its memorandum of law on the motion until October 15, 1993. Pet. App. 6a. At the hearing on the preliminary injunction motion on December 22, 1993, the district court accepted petitioner's suggestion that the court combine that hearing with the trial on the merits. *Ibid.* Shortly after the hearing, and before the district court's decision, Acquest substantially completed construction of the new office space and the United States Attorney moved into the building. *Ibid.*

On January 25, 1994, the district court issued its decision, rejecting each of petitioner's claims about the bid award and dismissing petitioner's complaint. Pet. App. 18a, 24a-37a. With respect to petitioner's claim that Acquest's bid was untimely, the district court held that Acquest was not required to submit its offer by the time specified in the solicitation for initial offers. Pet. App. 28a-29a. The court relied on

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[3] Under 31 U.S.C. 3553(d)(1), the contractor ordinarily must cease performance pending any bid protest, but 31 U.S.C. 3553(d)(2)(A) provides that the agency that awarded the contract "may authorize the performance of the contract (notwithstanding a protest * * *)" if it makes a written finding "(i) that performance of the contract is in the best interests of the United States; or (ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting" for GAO's decision on the protest.

Section 552.270-3(a), concluding that "[that] regulation makes it plain that the critical date is the deadline for [best and final offers]," not the deadline for initial bids. Pet. App. 29a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The only issue that the court specifically discussed was the timeliness of Acquest's offer. The court acknowledged that the Court of Federal Claims had recently held that the GSA regulation, 48 C.F.R. 552.270-3(a), is invalid. Pet. App. 8a, citing *Aerolease Long Beach* v. *United States*, 31 Fed. Cl. 342, aff'd, 39 F.3d 1198 (Fed. Cir. 1994) (Table). However, the court considered and rejected each of the three rationales put forth in *Aerolease* for invalidating the regulation.

First, the court held that the regulation does not conflict with a provision of the Competition in Contracting Act (CICA), which provides that "each solicitation * * * shall at a minimum include * * * the time and place for submission of proposals." 41 U.S.C. 253a(b)(2)(B)(ii). The court noted that "GSA included a time for submission of offers in the [solicitation]," and that the solicitation thus "compl[ied] with the literal requirement of [the CICA]." Pet. App. 11a. In any event, the statute "does not assert any penalty for bid submissions after this date," *ibid.*, and it was thus consistent with GSA's regulation providing that late bids will be accepted until the date set for best and final offers. The court also stated that allowing additional proposals up to the deadline for best and final offers serves "a predominant purpose" of CICA "to augment competition" by allowing more bidders to participate in the process. Pet. App. 11a-12a.

Second, the court of appeals held that the GSA regulation does not conflict with Federal Acquisition

Regulation (FAR) § 15.412(c), 48 C.F.R. 15.412(c), which provides: "Proposals, and modifications to them, that are received in the designated Government office after the exact time specified are *late* and shall be considered only if" certain conditions not present in this case are satisfied. The court reasoned that this provision "does not mandate any particular action by the GSA with respect to setting the deadlines to which those consequences will attach." Pet. App. 13a. The court also noted that the FAR provision "does not define what constitutes a late submission, and therefore does not contradict the GSA's policy of accepting proposals before the deadlines for [best and final offers]." *Ibid.*

Third, the court rejected the argument that it is unfair to the other bidders to allow a bidder to compete even when it did not submit a timely initial offer. GSA's regulations clearly set forth its policy of accepting bids until the deadline for the best and final offer, and petitioner and the other bidders accordingly "were or should have been aware * * * of the GSA's policy to allow late bids until the [best and final offer] deadline." Pet. App. 14a. In addition, the court noted that the early bidders have an advantage over later bidders because they have more time to negotiate with GSA over changes in their initial proposals. *Ibid.* In any event, the court concluded, federal procurement statutes and regulations "are not designed to establish private 'entitlements' to public business, but rather to produce the best possible contracts for the government in the majority of cases." *Ibid.*, quoting *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 206 (D.C. Cir. 1984).

ARGUMENT

Petitioner renews its contentions that the GSA regulation governing timeliness of a bid submitted after the date for initial bids but before the date for best and final offers is invalid. The court of appeals' decision on that issue is correct, and it does not conflict with any decision of this Court or any other court of appeals.[4] Moreover, even if petitioner's legal arguments were correct, it is doubtful that at this late date, the courts could properly order the relief petitioner seeks—the award of the contract and an injunction against performance of the contract with Acquest.

1. Petitioner contends (Pet. 8-9) that the GSA regulation violates a provision in the Competition in Contracting Act (CICA), 41 U.S.C. 253a(b)(2)(B)(ii), which provides that each solicitation for offers, where there are to be competitive proposals, must include "the time and place for submission of proposals." Agreeing with the decision of the Court of Federal Claims in *Aerolease*, see 31 Fed. Cl. at 366, petitioner argues that Section 552.270-3(a) is inconsistent with that statute.[5]

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[4] The decision of the court of appeals does appear to conflict with the decision of the Court of Federal Claims in *Aerolease*. Although the Federal Circuit affirmed the decision of the Court of Federal Claims in *Aerolease*, the issue of the validity of the GSA regulation was not presented on appeal, "apparently because the party against whom the ruling on [the GSA regulation] was directed did not participate in the appeal." Pet. App. 8a n.4.

[5] Petitioner seems to renew its suggestion (Pet. 8) that GSA erroneously interprets Section 552.270-3(a) to allow bids up to the time of the deadline for best and final offers. The language of the regulation, however, which generally prohibits con-

The statute by its terms requires only that a solicitation for competitive bids include a "time and place for submission of proposals." The solicitation here included such a designation of time and place. Pet. App. 4a. Petitioner argues, however, that the statute must be interpreted not only to require that solicitations set a definite time for submission of bids, but also to require automatic disqualification of bidders who fail to submit bids by the specified date. According to petitioner, failure to impose disqualification in those circumstances would "render[] [the statutory requirement] meaningless." Pet. 9.

The court of appeals' construction of the statute would not render it meaningless. As interpreted by the court, the statute serves the function of providing bidders a date by which they can submit initial proposals without fear that their bids will be rejected as too late. By submitting its bid by that date, petitioner ensured that its bid would be considered before a contract was awarded. Bidders like Acquest, who submit bids later, have no such assurance, since an agency could accept an initial bid or negotiate a final bid before a late bidder had the opportunity to enter

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sideration of offers received after the time specified for best and final offers, is inconsistent with that contention. (The 1985 version of the regulation also stated that the time for receipt of "[a]ny offer" is "the exact time specified for receipt of 'best and final' offers" (C.A. App. 125)). At any rate, as the court of appeals concluded (Pet. App. 9a), an agency's interpretation of its own regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994).

the contest. The statute's requirement that a solicitation specify a time and date for initial bids therefore serves an important function, even if an agency determines that later bids will be considered.

This explanation of Section 253a(b)(2)(B)(ii) reflects the important underlying purpose of CICA "to increase the use of competition in Government contracting" and "to safeguard against unnecessary sole-source contracts." H.R. Rep. No. 861, 98th Cong., 2d Sess. 1421 (1984). See also S. Rep. No. 50, 98th Cong., 1st Sess. 7 (1983). To that end, Congress required agencies to adopt "policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements * * * at the lowest reasonable cost." 41 U.S.C. 414(1). In accordance with that obligation, GSA determined that—at least with regard to the fluid market for lease of real estate—it is in the best overall interest of the government to use a flexible deadline in order to assure that no bidder that can make a superior offer would be prematurely frozen out of the procurement process. That approach worked well here, since Acquest's proposal was significantly superior to petitioner's. Pet. App. 4a-5a, 20a-21a.

2. Petitioner also argues (Pet. 9-10) that Section 552.270-3(a) is contrary to a provision of the general Federal Acquisition Regulations, 48 C.F.R. 15.412(c), which provides that "[p]roposals, and modifications to them, that are received in the designated Government office after the exact time specified are *late* and shall be considered only" under certain limited circumstances not applicable here.

The GSA regulation does not violate the FAR provision. The FAR provision requires that bids be submitted by "the exact time specified" by the contracting agency. It does not define that time, require that the time be included in a solicitation, or provide for the consequences if it is not. Here, the solicitation included a February 26, 1992, due date for initial proposals, but it also included the full text of the special GSA regulation applicable to leases of real estate. That regulation indicated that proposals could be submitted after the date for initial bids, as long as GSA received them before the deadline for best and final offers. C.A. App. 125. The solicitation thus did not contain any "exact time" for proposals, and no such time was set until GSA announced the "best and final offers" deadline. Acquest's bid was in fact submitted by that deadline. The bid was therefore timely under both the GSA regulation and the FAR provision.

Even if Section 552.270-3(a) did conflict with FAR Section 15.412, however, the GSA regulation would not be invalid. The GSA regulation applies only to the lease of real property. See 48 C.F.R. 570.701-3. Under Section 6(a)(1) of the Office of Federal Procurement Policy Act, 41 U.S.C. 405(a)(1), however, the FAR does not apply to procurement of "real property in being." Congress explained that this provision excludes from the FAR "the acquisition of a fee, easements, *leases*, or other interests in existing buildings and land." S. Rep. No. 692, 93d Cong., 2d Sess. 18 (1974) (emphasis added).[6] Accordingly, any

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[6] See also H.R. Rep. No. 1176, 93d Cong., 2d Sess. 13 (1974) (the FAR "does not extend to Government acquisition of the fee or other interests in land and existing improvements or in

inconsistency between the GSA regulation and the FAR would not render the GSA regulation invalid.

The Court of Federal Claims in *Aerolease* rejected this argument, 31 Fed. Cl. at 377, relying principally on *Forman* v. *United States*, 767 F.2d 875 (Fed. Cir. 1985). In our view, the Court of Federal Claims erred. We believe that *Forman* was incorrectly decided,[7] and it would not in any event be controlling on the facts of this case, since the Federal Circuit in *Forman* did not construe Section 405(a)(1), but instead construed a similarly worded provision of the Contract Disputes Act. In any event, the court of appeals in this case did not address the question at issue in *Forman*—whether the FAR governed acquisitions of leaseholds by the federal government—because it held that the GSA regulations at issue here are consistent with the FAR. That holding was correct, and this case therefore does not present the question whether the GSA regulations would be valid if they were inconsistent with the FAR.

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parts thereof (*such as office space*), whether by deed, *lease*, license or" other instruments) (emphasis added).

[7] *Forman*'s explanation of the legislative history—that it meant to exclude from the FAR only the government's acquisition of an existing lease from a third party, not the creation of a new lease with the government, 767 F.2d at 879—is in our view wrong. The House and Senate Reports both listed many types of interests in real property whose acquisition Congress intended to exclude from the FAR. Both Reports included leases among the interests to be excluded. There is no basis for reading those references to leases as limited to the narrow class of cases in which the government assumes a third party's existing lease, nor is there any apparent reason why Congress would have wanted to adopt such a limitation.

3. Petitioner also argues (Pet. 11) that the GSA regulation is "unfair" and violates the "spirit and intent of CICA." Petitioner relies on the decision of the Court of Federal Claims in *Aerolease*, which held that the CICA creates an "implied obligation of the Government to consider all bids and proposals fairly and honestly." 31 Fed. Cl. at 367.

Petitioner (Pet. 11-12) argues that the GSA regulation is unfair because those who made initial offers by the date stated in the solicitation "must keep their bids open for an indeterminate period of time when no similar obligation is imposed upon late bidders." Pet. 11. There is nothing unfair about that situation. Since the solicitation indicated that offers could be submitted up to the deadline for best and final offers, petitioner was fully on notice from the outset that later bids would be accepted. Indeed, petitioner itself had the option of submitting a later bid, as did Acquest. Instead, petitioner chose to avail itself of the benefits of submitting an earlier bid, including the opportunity for more time in which to negotiate with GSA over possible changes in its proposal before the deadline for best and final offers. Although petitioner may have assumed additional costs as well, that is a choice that petitioner made when it determined its strategy for bidding on the contract in this case.[8]

4. Finally, even if the GSA regulation did violate CICA or the FAR, petitioner would not be entitled to judgment in this case. Federal agencies' procure-

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[8] Any added cost incurred as a result of the need to keep a bid open a few additional weeks in this case is likely not to be significant in the context of the lease whose award is at issue. The lease was to be for a term of ten years, with two five-year extension options. Pet. App. 4a.

ment decisions cannot be set aside "unless they 'had no rational basis' or the process by which they were reached 'involved a clear and prejudicial violation of applicable statutes or regulations.'" *Elcon Enterprises, Inc.* v. *Washington Metropolitan Area Transit Authority*, 977 F.2d 1472, 1478 (D.C. Cir. 1992), quoting *Kentron Hawaii, Ltd.* v. *Warner*, 480 F.2d 1166, 1169 (D.C. Cir. 1973). See also *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 203-207 (D.C. Cir. 1984) (Scalia, J.). For the reasons given above, even if GSA could be found to have violated the CICA or the FAR, its error could not be characterized as clear or irrational.

Moreover, petitioner would not in any event be entitled to an award of the contract in this case. By the time of the district court decision in January, 1994, petitioner had already leased out at least part of its space, and thus was no longer able to perform on the terms of its best and final offer. Pet. App. 34a-35a. Moreover, because the United States Attorney's Office has long ago moved into the Acquest space, awarding the contract to petitioner at this point and requiring that Office to move once again would impose substantial costs on the government and could disrupt government functions. Such costs and disruption would be the result in part of petitioner's failure to file and fully brief its preliminary injunction motion until eight months after the complaint was filed in this case, during which time Acquest was building its structure and the United States Attorney's Office was preparing its move. Since "[petitioner] itself bears substantial responsibility for the delay" (Pet. App. 34a), the equitable factors governing a court's intervention into the government procurement process, see, *e.g.*, *Sea-Land*

Serv., Inc. v. *Brown*, 600 F.2d 429, 434 (3d Cir. 1979); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971), would in any event preclude judgment for petitioner in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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